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Supreme Court of the United States

OCTOBER TERM, 1954

No. 45 Misc.

LEONARDO SALEMI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF

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INDEX

	PAGE
Regarding the Question of Jurisdiction	1
I. As to the Insane Witness, Paul Janson	2
II. As to Admission in Evidence of the Entire Grand Jury Minutes on the Hearing for a New Trial	9
III. As to the Admission in Evidence of Prejudicial Newspaper Articles	10
IV. As to Inadequacy and Invalidity of the Trial Court's Charge	12
V. As to the Cases Cited by Respondent	12
Conclusion	14

Table of Cases Cited

Alford v. United States, 282 U. S. 687	7
Berger v. United States, 295 U. S. 78	8
Buchalter v. New York, 319 U. S. 427	1, 12, 13, 14
District of Columbia v. Armes, 107 U. S. 519	6
Mooney v. Holohan, 294 U. S. 103	8
New York ex rel. Bryant v. Zimmerman, 278 U. S. 63	13
People v. Davis, 52 Mich. 569	8
People v. Odell, 230 N. Y. 481	12
People v. Zackowitz, 254 N. Y. 192	11
Shepherd v. Florida, 341 U. S. 50	11
United States v. Atkinson, 297 U. S. 157	10
Williams v. Kaiser, 323 U. S. 471	9

Other Authorities Cited

Report on Lawlessness In Law Enforcement (1931)	8
Wigmore, Evidence, Vol. 1, Sec. 194	12

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PETITIONER'S REPLY BRIEF

Although most, if not all, of the matters contained in respondent's brief have already been covered in the Petition, certain statements or arguments advanced by respondent in the brief in opposition call for reply.

Regarding the question of jurisdiction.

The grounds upon which the jurisdiction of this Court is invoked and the cases cited to sustain its jurisdiction are set forth in the Petition and will not be repeated here.

It is noteworthy that the respondent does not even attempt to discuss or undertake to distinguish or explain away the numerous authorities cited in support of the Petition. Instead, these cases—with a single exception—are wholly ignored by the respondent.* No effort seems to have been made to meet our contentions except with stereotyped generalities.

* The *Buchalter* case cited in the Petition (p. 24) is the one and only case which challenged respondent's consideration at all (Respt's Br., pp. 12, 21). We will later make further reference to this case.

As more particularly set forth in the Petition, the federal questions sought to be reviewed herein were properly raised and present substantial questions under the Due Process Clause of the Fourteenth Amendment.

I.

As to the insane witness, Paul Janson.

Respondent's statement at page 10, wherein he undertakes to set forth petitioner's contentions under subdivision (1) of "Questions Presented," regarding the insane witness, Paul Janson, and assumes that the proposition stated by him is that asserted by the petitioner, is an incomplete generalization which requires correction.

This statement avoids reference to one of the essential parts of petitioner's contentions, namely, that the trial court received in evidence against the petitioner, the testimony of the said incompetent and insane witness, *"which fact was known to the prosecutor, but undisclosed to the defense and not divulged to the jury"* (Petition, p. 6).

Janson's entire testimony upon the trial must be examined to experience the full impact of his unreliability and mental confusion. It is an utter impossibility to compress this testimony within limits reasonable for a Petition, except by a statement of the barest outline. The petitioner's claim of a denial of a federal right on this point can be presented adequately only in a more extended argument in the brief on the merits, if certiorari be granted by this Court, in the exercise of its discretion.

Nothing in respondent's brief on this application overcomes the fact that the District Attorney was possessed of knowledge concerning the insane and incompetent witness Janson, which was not disclosed to the defense and not revealed to the jury.

Respondent asserts at page 15 that "regardless of what the petitioner may say as to his knowledge of the true

nature of Janson's actions, any reasonable person would recognize as a suicide attempt."

The record shows that when Janson appeared in the courtroom on November 13, 1952, with a bandaged head, not a single question was asked on direct examination as to the reason for the bandage although obviously the man had been injured (280-321). On cross examination, defendant's attorney called attention to Janson's appearance and the Court asked how it happened. The answer was "I ran into some bars" (326).

For a short while it seemed that this was just an accident resulting from failure to notice the bars. When he stated that he did see them, he was asked by the Court to tell the time on the clock in the rear of the courtroom. Janson said it was 3:37 when in fact it was 3:27 (329). When the day's session ended, the court ordered Janson placed in the custody of the police instead of sending him back to the Bronx County jail or releasing him (395).

The following day, November 14th, when Janson resumed the witness stand, he was asked whether he had discussed the case with anyone the previous day. His answer was:

> "I dropped—was asked questions. I always answered them the wrong way" (479-480).

When the cross examination had been concluded a definite impression was left behind that Janson's injury resulted from a momentary excitement or anger induced by some undisclosed external cause (482-4; 2869-2874; 2892-2898) and was not motivated by any suicidal design. In the respondent's brief at page 7, it is erroneously stated that defendant's attorney asked Janson whether he had ever been treated by a psychiatrist or been confined in a mental institution. These questions were put by the Court (482-4; 2893-2898).

Upon the hearing for a new trial, the police officer (Detective Mengrone) in charge of the case testified as a defense witness (2214 *et seq.*). On the morning of No-

vember 12th, the day the case began, the officer brought Janson from the jail to the District Attorney's office where he was kept all day. Janson's head was bandaged. The officer learned that Janson had attempted suicide at the prison the day before and he so advised Assistant District Attorney Dermody in charge of the case (2266-7).

When Janson was asked, on the hearing for a new trial, why he testified upon the trial that he did not know the reason he banged his head against the bars after having told the Warden and Captain of the prison that his purpose was to destroy himself, his answer was "I was befuddled, I guess" (3367-8). This was immediately retracted by his admission that the real, honest reason was because he did not want the Court and jury to know that he attempted suicide (3369).

The only impression—contrary to the assertion of respondent at page 15—that any reasonable person could possibly get from Janson's trial testimony was that something had occurred in the prison that got Janson excited. No possible inference could have been drawn by the defendant or his counsel or the jury that the injuries resulted from a determined inner compulsion to destroy life. The true facts, however, were known to the District Attorney and withheld from the defense.

After Janson concluded his testimony and was placed in police custody, he was maintained at a hotel under day and night guard and kept *incommunicado* (2224-2236). His whereabouts were not even disclosed to his wife and no medical attention was afforded him except to have his head dressed (2232-3). His mental condition deteriorated rapidly. He was in despair; his head was bothering him (3247-8). He stopped eating, smoking and talking and just stared at the walls of his room (2232, 2241). He imagined he saw things moving around at night (3283). He could not eat, felt depressed, run down and nervous and did not care what happened to him (3283, 3162). "I was starting to fall apart in other words" (3165).

The police advised the District Attorney of Janson's condition (2241, 2311). *This was during the time that the trial was still in progress, but none of this information was revealed to the defense by the District Attorney* (2243).

It only came to light after defense counsel ascertained from entirely different sources that Janson had been committed as an insane person to Bellevue Hospital at the instigation of the District Attorney's physician the day after the verdict was rendered.

Janson was psychotic prior to the commencement of the trial, during its progress and was committed only after the trial was ended.

Janson's condition was one that started from a series of events in early life and culminated in a dramatic exhibition of disturbed behavior by attempting suicide (2155-6). It is a continuous process that does not stop for a while and then repeats itself. It is not an episodic disease which turns on and off as a water faucet (2181).

The present attempt (Respt's Brief, pp. 8, 12) to minimize Janson's mental condition finds no support in medicine or common sense. Clinical experience indicates that Janson was psychotic on November 11, 1952, when he attempted suicide and that the psychosis continued at least from that date to November 21st when concededly he was insane (2180-1). The official records of his mental derangement evidenced by the reports from the City Prison, Bellevue and Pilgrim State Hospitals present the typical case of an involutional psychotic which expressed itself definitely on November 11th and worsened thereafter. A personal examination of the patient—who was found in the case records of the hospitals to be hallucinatory, delusional and paranoid—was unnecessary (2181, 2208). Such a person who exhibits the disturbed patterns of thinking, acting and feeling as manifested by Janson is untrustworthy for all purposes (2209). Particularly is this true when he is the only identifying witness and his testimony is relied upon to deprive another human being of life.

Respondent's present contention (p. 12) "that there is no definitive proof, that Janson was, in fact, insane at the time he testified at the trial", flies in the face of the facts which were adduced by the defendant for the first time upon the motion for a new trial.

The important factor, which respondent carefully refrains discussing or explaining, is the failure by the District Attorney to advise the defense of Janson's condition which had been made known to him. And still more important was the failure to have the facts revealed to the jury so that Janson's testimony might be properly appraised in the light of his mental condition (*District of Columbia* v. *Armes,* 107 U. S. 519).

What the District Attorney did the day after the case ended—having Janson examined and placed in Bellevue Hospital, Psychiatric Ward—should have been done before permitting him to testify, or at least while the case was still in progress and Janson's disturbed mental condition became increasingly worse. In any event, every concept of fair play dictated that the facts be disclosed to the defense by the prosecutor.

The respondent asserts at p. 14 that "*prior to judgment*" the defense was informed of the Janson "development". This statement is ambiguous and equivocal. The information as to Janson's attempted suicide and mental condition was derived from independent sources following Janson's commitment to Bellevue Hospital the day after the jury's verdict. The complete facts as to Janson were not known to the defense until February, 1953, when the hospital records were made available to the defense (2874-2884; 2900-4). The jury's verdict was rendered November 20, 1952 (16; 1761). Judgment of death was not pronounced until June 24, 1953 (4129-31; 4188-90).

Even respondent's own expert conceded that after suicide is attempted, a psychiatric examination should be made of the person as soon as possible, and that it is the proper thing to do (3541-2).

Concededly Janson was insane on November 21st (3432). Respondent's expert would not or could not say how long Janson had been suffering from this condition (3434), but he conceded that the insanity was present some time prior to November 21st when he first examined him (3810). This expert also conceded that Janson was then in such a mental condition that it would have been improper to call him as a witness for any purpose and, if so called, that the Court and jury should have been made aware of the condition (3534-6).

As to the denial of due process on this feature of the case.

The jury—sitting in judgment in a case involving a human life—were entitled to the whole truth. We again stress the point that Janson was the sole identifying witness against the accused. His testimony was the only vital testimony in the whole case and his credibility was of prime importance. By reason of the conduct of the prosecutor in failing to divulge the facts known to him surrounding Janson's suicide attempt, an unfair advantage was taken of the accused since defense counsel was blocked in revealing matters to the jury tending to discredit Janson's testimony which were discovered subsequent to the trial, resulting in grave prejudice to the defendant. It is as much the duty of a prosecutor to see that an accused on trial is not deprived of any of his constitutional rights as it is to prosecute him for the crime with which he may be charged.

In *Alford* v. *United States,* 282 U. S. 687, 692, Mr. Justice STONE, delivering the unanimous opinion for reversal said:

> "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them."

The District Attorney is a quasi judicial officer, and was duty bound to disclose these vital facts even though such

suppressed evidence might weaken—if not destroy—the case for the prosecution.

In its Report on Lawlessness in Law Enforcement (1931), Vol. IV, the National Committee on Law Observance and Enforcement, declared at page 286, on the subject of Unfairness in Prosecutions:

> "High standards have been set for a prosecutor by the bench and the bar. Unlike the counsel for the defense, he is not solely an advocate for his client. He presents the case for the State, and yet he is to possess, in some measure, the impartiality of the judge."

The duties and obligations of a United States Attorney, applicable to all public prosecutors, were defined in the frequently cited case of *Berger* v. *United States,* 295 U. S. 78, 88; 55 S. Ct. 629, 633.

In the striking language of Cooley, C. J., in *People* v. *Davis,* 52 Mich. 569:

> "The State has no interest in interposing any obstacles to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons.
>
> "* * * If there shall be in the possession of any of its [the State's] officers information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence, the defense should be given the benefit of it."

The action of prosecuting officers on behalf of the State may constitute state action within the purview of the Due Process Clause of the Fourteenth Amendment (*Mooney* v. *Holohan,* 294 U. S. 103, 112, 113, 55 S. Ct. 340).

Respondent refers at page 2 to petitioner's alleged flight, but studiously refrains from mentioning the fact that the petitioner *voluntarily surrendered* himself in the District Attorney's office on May 14, 1952 (934; 945).

In our Petition, we have endeavored to set forth a concise statement of the case containing all that is material to the consideration of the Federal questions presented herein. Respondent's factual presentation calls for correction in many respects, but it would unduly prolong this reply to enter upon an extended analysis thereof, which would be more appropriate and permissible in the brief on the merits and on oral argument should this Court grant certiorari.

In the light of the record, the suggestion advanced by respondent at page 13 that this case was "obviously decided" upon state grounds is untenable. Without Janson's testimony there was no case whatever against the defendant. We therefore submit that there is no adequate nonfederal ground in support of the state court judgment. Under these circumstances, "it will be presumed that the state court based its judgment on the law raising the Federal question, and this court will then take jurisdiction". (*Williams* v. *Kaiser,* 323 U. S. 471, 478).

II.

As to admission in evidence of the entire Grand Jury minutes on the hearing for a new trial.

We believe that we have sufficiently covered this point in the Petition and little need be said in reply. The respondent's brief in opposition does not, we submit, meet the contentions made that the admission in evidence of the entire Grand Jury minutes—on the hearing for a new trial—of witnesses who had not testified at the trial; who did not confront the defendant; and who were not subject to cross-examination, deprived the whole course of proceedings resulting in the death sentence of the defendant, of the fundamental essentials of due process guaranteed by the Federal constitution.

Respondent states at page 17—referring to the Grand Jury testimony of the deceased witness Paiutta read into the record, over the protest of defense (1765-1772; 1776-

7)—that "although he does not say so, the petitioner evidently feels that the testimony prejudiced him in the eyes of judges of the Court of Appeals".

Here is what the petitioner himself said, among other things, on the day he was sentenced to death, after the so-called "full-scale hearing" was held:

> "* * * And the Court's own prejudicial attitude, in my opinion, made this fact so obvious it just couldn't wait to tell the jurors all about Paiutta's death, thereby maneuvering it into the record, for no apparent reason other than to hurt my chances for appeal as well as to show justification of its attitude throughout my trial" (4177-8).

All efforts to expunge this highly prejudicial matter were rebuffed by the trial court (1776-7) and on the motion for a new trial (2946-2960). This was an indefensible invasion of the petitioner's fundamental rights to due process.

"In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings" (*United States* v. *Atkinson,* 297 U. S. 157, 160). *A fortiori* is this true when the introduction of this *ex parte* evidence is bitterly protested and exception duly noted (2943-53).

III.

As to the admission in evidence of prejudicial newspaper articles.

This point has been fully treated in the Petition (pages 22-4).

The respondent at page 19 attempts to gloss over our contention that the defendant's fundamental constitutional rights were violated in receiving in evidence these highly

inflammatory newspaper articles, by a nonchalant characterization of these newspaper clippings as "insignificant."

Was it "insignificant" to admit in evidence these newspaper articles (reproduced in the Record on Appeal, pages 1407, 1409, 1411) which purported to deal with the defendant and his past life; which contained statements relative to a man who had been murdered while the defendant was in custody awaiting trial and linked the death of this man—who was an alleged witness to the homicide—to the case then pending against the defendant?

Jackson, J., concurring in *Shepherd* v. *Florida,* 341 U. S. 50, at 53, said:

> "Newspapers, * * * may not deprive accused persons of their right to fair trial. These convictions, accompanied by such events, do not meet any civilized conception of due process of law. * * *"

The prosecutor must have known the ineradicable prejudice and suspicion such flagrantly unfair and sensational newspaper articles would engender against the defendant when he sought a new trial upon the ground of newly discovered evidence.

At page 14 of respondent's brief, he asserts that a "full-scale hearing was held [on the motion for a new trial] which lasted longer than the actual trial." The hearing was protracted, indeed, but the fundamental unfairness of the hearing speaks from the record itself and becomes the immediate palpable reaction when we consider the cumulative force of the basic constitutional errors of which we complain. This "full-scale hearing," infected with these gross errors, resolved itself into a mere formality, sham and pretense and clashed with the rudimentary requirements of justice.

In the Petition, we cited, among other authorities (p. 23) the case of *People* v. *Zackowitz,* 254 N. Y. 192, 198. Mr. Justice Cardozo, then Chief Judge of the Court of Appeals, quoted with approval, the following pertinent

language from Wigmore, *Evidence,* Vol. 1, sec. 194:

> "The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge."

IV.

As to inadequacy and invalidity of the Trial Court's charge.

This contention is fully presented in the Petition at pages 16, 24. Respondent cites at page 21, the case of *Buchalter* v. *New York,* 319 U. S. 427, 431, wherein this Court held, among other things, that the court's instructions under attack did not deprive the defendants of a trial according to the accepted course of legal proceedings. Obviously, the validity of a court's charge must depend on all the circumstances of the particular case.

In the case at bar, *three* judges dissented and voted for reversal and a new trial on the ground that the Court's charge did not "marshal the evidence" as required by *People* v. *Odell,* 230 N. Y. 481.

V.

As to the cases cited by respondent.

The authorities cited by respondent (p. 11) do not in any degree controvert the contentions made by the petitioner that he was deprived of due process of law in the four major particulars specified at pages 6-7 of the Petition.

These cases lend no support to respondent's position, because the facts therein are so widely different from the case at bar that a detailed discussion thereof would serve no useful purpose.

Brushing aside petitioner's contentions and the authorities cited in the Petition to sustain the jurisdiction of this Court, respondent assumes as the premise of his argument that no federal questions were properly raised or presented herein. As the premise is fallacious, the respondent's conclusions necessarily fail.

In framing the federal questions for presentation to the state court, the petitioner was not shackled by any iron bound formula. It was essential only that he bring the federal claims and the grounds therefor to the state court's attention with fair precision. Each case should be governed by the circumstances surrounding it and "if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented" (*New York ex rel Bryant* v. *Zimmerman,* 278 U. S. 63, 67).

It is a total misconception of our position for respondent to assert that we maintain that mere errors as to state law are reviewable in this Court (Respondent's Brief, pp. 11-12; 21, quoting excerpt from *Buchalter* v. *New York,* 319 U. S. 427, at p. 431).

We cannot leave this subject without referring once more to petitioner's own statement to the trial court just before the petitioner was sentenced to death (4155-4187).

Protesting that he was denied and deprived of his fundamental rights to a fair, impartial and deliberate trial and was the victim of a gross miscarriage of justice, he exclaimed:

> "And for the benefit of the Justices of the High Courts, I say with extreme care, your Honors, the part this Court has played in this farce referred to as my trial, and see if it wasn't the killing of Basilio Paiutta that I was tried for, along with the killing of Walter Forlenza, which held little or no water at all" (p. 1393).

Surely there was nothing "vague and inferential" in the petitioner's own plea of denial of due process, when he solemnly declared:

> "* * * I nevertheless feel confident that in the final analysis, the High Court will take a hand in correcting this unexpected verdict, in which the weight of the evidence is definitely contrary to the verdict returned. That is what the High Courts are for, to see that the elementary concepts that stand ingrained in our legal framework are carried out to the very letter of our laws and stand to be used whenever life or liberty is in peril * * *" (R. p. 1395).

In final analysis, our contention is clearly expressed in the language of this Court in the *Buchalter* case, *supra,* at page 429:

> "The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land.' Where this requirement has been disregarded in a criminal trial in a state court this court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee. * * *"

We have demonstrated as a reality and beyond question the total unfairness of the trial and the subsequent proceedings to which the defendant was subjected. This is not speculation and conjecture. The solid facts proclaim the defendant's denial of his constitutional rights upon the grounds set forth herein.

We respectfully submit that the record amply sustains the allegations of the Petition.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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INDEX

PAGE

Petition for Rehearing 1

Reasons for Granting Rehearing 2

Conclusion 7

Certificate of Counsel 7

Table of Cases

Brinkerhoff-Faris Trust Co. v. Hill, 280 U. S. 604, 550, 281 U. S. 673 2

Buchalter v. New York, 318 U. S. 766, 797 3

Buchalter v. New York, 319 U. S. 427, 429 3

Cafeteria Employees Union v. Angelos, 319 U. S. 753, 778 3

Hickman v. Taylor, 327 U. S. 808, 328 U. S. 876, 329 U. S. 495 2

Hill v. Texas, 316 U. S. 400, 406 6

Malinski v. New York, 324 U. S. 401, 416-417 6

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, LEONARDO SALEMI, a state prisoner confined in the Death House at Sing Sing Prison, Ossining, New York, respectfully prays that this Court grant rehearing of its order of October 14, 1954 denying his petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, affirming by a closely *divided* Court of *four-to-three,* a judgment of conviction and sentence of death imposed by the Court of General Sessions, New York County, upon a verdict rendered by a special or so-called "blue ribbon" jury convicting petitioner of the crime of Murder in the First Degree.

Upon consideration of the application of counsel, a stay of execution of the death sentence was granted by Mr.

Justice Reed, pending the filing and final disposition of the petition for certiorari herein, as more particularly set forth in the order dated April 24, 1954.

This petition for rehearing is filed within the time prescribed in Rule 58 of the Revised Rules of this Court and is made pursuant to the provisions of the said Rule.

Reasons for Granting Rehearing and Issuing the Writ

I.

The petition for certiorari presented substantial Federal questions of the gravest importance under the Due Process Clause of the Fourteenth Amendment in four major particulars enumerated at pages 6-7 of the petition which justified a review of the case.

II.

There is no basis whatever for respondent's bare assertion that the Court of Appeals obviously decided the case upon state grounds in the first instance.

In presenting this application we have clearly in mind the limitations of Rule 58 governing the filing of a petition for rehearing after denial of certiorari.

We do not file this petition to gratify a desire to argue once more the very questions which have already been submitted to this Court. Because we are so convinced that there was a denial of due process in this case, we can only believe that the Court's adverse decision herein, may well have resulted from an inadequate presentation of the petitioner's contentions in a case in which his life is at stake.

Our study of the cases in this Court reveals that in a few instances, a successful petition for rehearing did no more than clarify the arguments advanced in the original petition for certiorari. (*Hickman* v. *Taylor,* 327 U. S. 808, 328 U. S. 876, 329 U. S. 495; *Brinkerhoff-Faris Trust Co.* v. *Hill,* 280 U. S. 60[illegible], 550, 281 U. S. 673.)

In *Cafeteria Employees Union* v. *Angelos*, 319 U. S. 753, 778, it appears that the petition for certiorari to the Court of Appeals of New York was denied on the ground expressly noted: "that it does not appear from the record that the federal question presented by the petition was properly presented to or expressly passed on by the New York Court of Appeals." A petition for rehearing was granted and the order denying certiorari, *ante*, page 753, vacated. The petition for writ of certiorari to the Court of Appeals was thereafter granted.

These were civil cases. Turning now to a capital case, it is interesting to note that in *Buchalter* v. *New York*, 318 U. S. 766, 797, the original petition for writ of certiorari to the Court of Appeals was denied. The petition for rehearing was granted and the order denying certiorari, *ante*, page 766 vacated and the petition for writ of certiorari was thereafter granted.*

If this Court can be persuaded in the light of the record, that the petitioner has presented sufficient proof regarding the matters specified below:

As to the Insane Witness, Paul Janson:

(a) That the prosecutor was advised by the police of Janson's attempted suicide the day before the trial commenced (2266-2267);**

(b) That the prosecutor was further informed by the police of Janson's mental breakdown during the progress of the trial (2236-2245);

---

* As we pointed out in our original petition referring to the *Buchalter* case (p. 24) this Court "granted certiorari in order that the petitioners' claims of denial of a federal right might be examined in the light of the record with the aid of briefs and oral argument" (*Buchalter* v. *New York*, 319 U. S. 427, 429).

** References, unless otherwise indicated, are to the folios of the certified record on appeal submitted on filing of the original petition for certiorari.

(c) That the prosecutor withheld from the jury and the defense these vital facts involving the only eyewitness to the alleged homicide;

(d) That Janson—on whose testimony the prosecution relied—was insane and mentally incompetent at the time he testified, which fact was not disclosed to the defense and not revealed to the jury;

(e) That upon the discovery of Janson's insanity and his commitment to Bellevue Hospital as an insane person at the instigation of the District Attorney's psychiatrist the day after the verdict was rendered, an application was made for a new trial upon the ground of newly discovered evidence and the deprivation of the defendant's constitutional rights (pp. 600-673; see fols. 1805-1806 et seq.);

As to the Grand Jury Testimony of the Deceased Witness, Basilio Pauitta:

(f) That the trial court over the protest of the defense read to the jury, after the verdict, testimony given before the Grand Jury by a witness (Basilio Pauitta) who had died before the trial (pp. 589-591); that the trial court denied defendant's request that this Grand Jury testimony be excluded from the record (p. 592); that upon the hearing for a new trial, the defense unsuccessfully renewed its application to expunge this highly prejudicial matter from the record (pp. 981-987);

As to Admission in Evidence of the Entire Grand Jury Minutes:

(g) That the trial court upon the hearing for a new trial received in evidence all of the testimony given by witnesses called before the Grand Jury, despite objection that these witnesses had not tes-

tified at the trial; that the defendant had the right to be confronted by these alleged witnesses and had the right to cross-examine them (pp. 981-987);

As to Admission in Evidence of Inflammatory Newspaper Reports:

(h) That the trial court received in evidence, over objection (p. 890), newspaper articles concerning the alleged murder before trial of a Grand Jury witness (Basilio Pauitta) which contained statements linking the death of this man to the case then pending against the defendant and which newspaper articles purported to deal with the defendant and his past life (p. 890; pp. 1407, 1409, 1411);

As to the Trial Court's Charge:

(i) That the trial court's charge did not marshal any of the evidence in the case, and charged only general legal abstractions (pp. 540-585);

we are confident it would then decide that what occurred at this trial and upon the hearing for a new trial was so serious a denial of due process to warrant its intervention.

It seems to us that the initial point of inquiry is whether the petitioner has made out a *prima facie* case of a denial of due process under the Federal Constitution. We respectfully submit that the unusual facts and circumstances disclosed by the record merit review by this Court.

The respondent has failed to point out any non-federal ground adequate to support the judgment of death imposed on the petitioner.

This Court has repeatedly acted when convinced that fundamental due process has been denied. In this case, the conclusion that this has occurred stems from no single

incident; it rests upon a cumulation of errors to which we have referred in the original petition for certiorari.

Mr. Chief Justice Stone, delivering the unanimous opinion of this Court in *Hill* v. *Texas*, 316 U. S. 400, 406, declared:

> "It is the State's function, not ours, to assess the evidence against a defendant. But it is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees."

The test which this Court applies in examining due process violations in state courts has been stated as follows by Mr. Justice Frankfurter in *Malinski* v. *New York*, 324 U. S. 401, 416-417:

> "Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."

Due process of law is not merely the shadow or semblance of a trial. Considering the close decision of affirmance by the Court of Appeals there is certainly reasonable doubt whether the petitioner received a fair trial.

We submit that no judgment, especially in a capital case, ever should go unreviewed in this Court, where the mind of anyone studying the record is oppressed with a distressing doubt not only as to the justice of the verdict but the fundamental unfairness of the trial itself and the subsequent proceedings to which the petitioner was subjected.

When Janson—the sole eyewitness to the alleged homicide—was committed to the Psychiatric Ward at Bellevue Hospital, he said he "*was not sure of the man who did the*

shooting'' (1943). At Pilgrim State Hospital for the Insane, the official admission note on December 4, 1952, relating to Janson set forth that *he said he did not see the shooting but identified the man in Court, and then was not sure and that was the reason he attempted suicide* (1986).

The death penalty is final—it leaves no margin for mistake or the correction of a tragic blunder of justice.

Can there be a serious question as to the fundamental merit of petitioner's contention that he has been deprived of due process of law in the four major particulars enumerated at pages 6-7 of the petition?

Conclusion

For the reasons assigned herein and in the petition for writ of certiorari, and petitioner's reply brief, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals of the State of New York as prayed in the petition.

Respectfully submitted,

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JACOB SHIENTAG,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Revised Rules of this Court.

RUDOLPH STAND,
Counsel for Petitioner.